IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff, OPINION AND ORDER

and 11-cv-267-bbc

LORI DUNSE, MYLINDA BROWN and SAMANTHA GAY,

Intervenor Plaintiffs,

v.

MISSOULA MAC, INC. d/b/a
McDONALD'S RESTAURANTS,

Defendant.

- -

Plaintiff Equal Employment Opportunity Commission has brought this action against defendant Missoula Mac, Inc. pursuant to its authority under 42 U.S.C. § 2000e-5(f)(1) to sue for violations of Title VII of the Civil Rights Act of 1964. Plaintiff alleges in its complaint that male employees at a McDonald's restaurant defendant owns in Reedsburg, Wisconsin sexually harassed intervenor plaintiffs Lori Dunse, MyLinda Brown, Samantha Gay "and other similarly situated female employees" and defendant failed to take

appropriate action to correct the problem. In addition, plaintiff alleges that defendant constructively discharged Brown and fired Dunse and Gay in retaliation for complaining about the harassment and that it subjected female employees generally to a hostile work environment.

Defendant has filed a motion for partial summary judgment, which is ready for decision. Dkt. #16. Defendant is not seeking dismissal of the claims related to Brown, Dunse and Gay. Rather, defendant says that the claims related to the "other similarly situated female employees" (who are not named in the complaint) should be dismissed because plaintiff did not identify those employees during the conciliation process that is required by 42 U.S.C. § 2000e-5(b). In addition, defendant says that it is entitled to summary judgment on the claims related to five of these unnamed employees (Liberty Stanford, Tylah Baetje, Cassandra Giese, Lacey Stanclift and Margaret Warren) because the alleged harassment of them was not severe or pervasive. Finally, defendant says that Darla Ebbs, Vanessa Bennett and Stephanie Reilly failed to appear for their scheduled depositions. (Defendant also says that plaintiff cannot prevail on a "pattern or practice" claim under 42 U.S.C. § 2000e-6, but I need not consider that argument because plaintiff says that it has not raised such a claim.)

In response, plaintiff says it was not required to name particular employees during the conciliation process and that defendant had sufficient notice regarding employees other than

Brown, Dunse and Gay because plaintiff informed defendant that a class of employees was involved and because defendant was aware that other employees had made complaints about sexual harassment. (Plaintiff has filed a motion to file supplemental authority on this issue, along with a recent decision from the Northern District of Illinois. Dkt. #63. I will grant that motion.) With respect to Stanford, Baetje, Giese, Stanclift and Warren, plaintiff says the evidence is sufficient to allow a reasonable jury to find that their harassment was severe or pervasive. Plaintiff does not oppose the dismissal of claims related to Ebbs, Bennett and Reilly, so I will grant defendant's motion as to those claims.

With respect to the remaining claims, I conclude that defendant has failed to show that they should be dismissed for any failure by plaintiff during the conciliation process. In addition, plaintiff has adduced sufficient evidence to allow a reasonable jury to find that Baetje, Warren and Giese were subjected to severe or pervasive sexual harassment. However, I am granting defendant's motion for partial summary judgment as to Stanford and Stanclift because the evidence as to those employees is not sufficient to sustain a claim under Title VII.

OPINION

A. Failure to Conciliate

I can resolve with little discussion defendant's argument that plaintiff failed to comply

with the conciliation requirement in 42 U.S.C. § 2000e-5(b) with respect to the employees who were not named in the charge. The parties acknowledge that the Court of Appeals for the Seventh Circuit has not addressed the question whether the EEOC must identify during the conciliation process each employee for which the EEOC later seeks relief and they acknowledge that other courts are split on the question. Compare EEOC v. CRST Van Expedited, Inc., — F.3d —, No. 09-3764, 2012 WL 1583026, *11 (8th Cir. May 8, 2012) (naming each claimant is required), with EEOC v. Rhone–Poulenc, 876 F.2d 16, 17 (3d Cir.1989) (per curiam) (not requiring individual attempts to conciliate on behalf of each similarly situated class member); EEOC v. Cone Solvents, Inc., 2006 WL 1083406, *9 (M.D. Tenn. 2006) ("As long as the outline of the class is identified, each female within the 'class' need not be specifically identified in the conciliation process."); EEOC v. Dial Corp., 156 F. Supp. 2d 926, 942 (N.D. Ill. 2001)(naming each claimant not required).

Although the issue is unsettled in this circuit, even if I assume that plaintiff should have identified the other employees during the conciliation process, defendant does not dispute plaintiff's view that, generally, the proper remedy for a failure to conciliate is a stay of the proceedings to allow the parties to engage in the process, not dismissal of the case. E.g., EEOC v. United Road Towing, No. 10-C-6269, slip op. (N.D. Ill. May 11, 2012) (attached to dkt. #63 in this case); EEOC v. Crye-Leike, Inc., 800 F. Supp. 2d 1009, 1019 (E.D. Ark. 2011); EEOC v. High Speed Enterprise, Inc., 2010 WL 8367452, *6 (D. Ariz.

2010); EEOC v. First Midwest Bank, N.A., 14 F. Supp. 2d 1028, 1031 (N.D. Ill.1998). See also 42 U.S.C. § 2000e-5(f)(1) ("[u]pon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending . . . further efforts of the EEOC to obtain voluntary compliance"). Particularly because defendant does not develop an argument that plaintiff acted in bad faith, I would not be inclined to dismiss the case rather than stay it. However, defendant has not suggested that it has any interest in further conciliation. After plaintiff asked for further conciliation in its opposition brief, defendant simply ignored the issue in its reply brief. Thus, it is likely that ordering conciliation now would accomplish nothing but a delay to the proceedings. Accordingly, I decline to stay the case.

A potentially stronger argument by defendant for dismissal would be that plaintiff failed to comply with the notice requirements of Fed. R. Civ. P. 8. By failing to identify the other employees in the complaint filed in this court, plaintiff left undefined the scope of its claims, the employees that are the subject of the lawsuit and the conduct for which plaintiff is seeking a remedy. Although the problem is obvious, defendant does not object to the claims of the unnamed employees on the ground that they were not identified in the complaint. Presumably, defendant does not believe it was prejudiced by the lack of notice because it has had an opportunity to depose the other employees. In any event, Rule 8 is intended to protect the interest of the defendant, so if defendant does not object to the complaint, I see no reason to limit the case on that ground. Cf. Bresette v. Knudsen, 2006

WL 6108682, *1 (W.D. Wis. 2006) ("A trial court is permitted to grant a motion to amend the pleadings so that evidence can be introduced and the merits of an action heard, so long as the opposing party is not prejudiced by the late amendment.") (citing Moncrief v. Williston Basin Interstate Pipeline Co., 174 F.3d 1150, 1160 (10th Cir. 1999), and New York State Electrical & Gas Corp. v. Secretary of Labor, 88 F.3d 98, 104-05 (2d Cir. 1996)).

B. Severe or Pervasive Conduct

To prevail on a claim for sexual harassment under Title VII, the plaintiff must prove that the conduct at issue was (1) motivated by the employee's sex; (2) not welcomed by the employee; and (3) severe or pervasive, both objectively and subjectively. In addition, a basis for employer liability must be present. Berry v. Chicago Transit Authority, 618 F.3d 688, 691 (7th Cir. 2010). In its motion for partial summary judgment, defendant argues that plaintiff cannot obtain relief for employees Liberty Stanford, Tylah Baetje, Cassandra Giese, Lacey Stanclift and Margaret Warren because they were not subjected to objectively severe or pervasive conduct. Because defendant does not develop an argument as to the other elements, I will not consider those. Pourghoraishi v. Flying J, Inc., 449 F.3d 751, 765 (7th Cir. 2006) ("The party opposing summary judgment has no obligation to address grounds not raised in a motion for summary judgment.").

The requirement for "severe or pervasive" conduct is grounded in the language of

Title VII, which is limited to discriminatory acts that alter the terms or conditions of employment. 42 U.S.C. § 2000e-2(a); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986). Courts often use the term "hostile work environment" as short hand for the type of conditions that are necessary to sustain a claim. In determining whether the harassment rises to this level, courts may consider a number of factors, such as the frequency of the conduct, whether it is humiliating or physically threatening and the extent to which it interferes with the employee's work performance. Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

I will address the evidence plaintiff has adduced with respect to each of the five employees to determine whether a reasonable jury could find that plaintiff has met this standard. Unfortunately, plaintiff has made this task more difficult by failing to discuss each employee individually in its brief, instead lumping them all together as if all of their allegations may be combined. Of course, that is not how it works. Although the EEOC is empowered to sue on behalf of multiple employees, the requirements for proving a discrimination claim are no different for the EEOC than for anyone else. Plaintiff says that "[b]ecause a hostile work environment claim is comprised of a series of separate acts that collectively constitute one unlawful employment practice, courts must not carve up the incidents of harassment to see if each incident rises to the level of being severe or pervasive." Plt.'s Br., dkt. #28, at 12 (citing Mangano v. Sheahan, 2002 WL 1821738, *8 (N.D. Ill.

Aug. 7, 2002)). That is true, but in Mangano the court was discussing this concept in the context of an individual employee's claim; the court did not suggest that multiple plaintiffs could fill gaps in their claims by relying on harassment of others of which they were not even aware. Accordingly, in evaluating the merits of each claim, I have focused on the evidence cited by plaintiff in its proposed findings of fact as to each employee rather than the arguments in plaintiff's brief.

1. Liberty Stanford

Plaintiff relies on the following acts of alleged harassment to support its claim related to Stanford:

- Stanford observed the janitor ask Tylah Baetje in Spanish, "How are you, Sexy Mommy" or "something like that"; although Stanford does not speak Spanish, Baetje translated the statement. Stanford Dep., dkt. #17-15, at 55-56;

- Stanford observed the janitor make another statement to Baetje in Spanish; Stanford does not recall the words, but she believed the comment was sexual because of "body language" and because she "was told that it was a sexual word"; when Baetje heard the statement, her body language was "not happy looking, disgrace, discomfort." Id. at 51-54.

Plaintiff cites other evidence, but it is not admissible. Stanford testified that she saw two text messages in Spanish sent to Baetje, that Baetje told her about other messages and that she observed what she described as "sexual name calling" toward Samantha Gay. Id. at 41-45. However, Stanford did not identify the content of the messages, so it is impossible

to determine whether they could support a discrimination claim. Petts v. Rockledge Furniture LLC, 534 F.3d 715, 722-23 (7th Cir. 2008) (in discrimination case, "[t]he district court correctly declined to consider [the plaintiff's] conclusory, nonspecific allegations about comments allegedly made by" defendant's employees). In addition, plaintiff cites testimony from Margaret Warren that Stanford once stated that she was being sexually harassed, Warren Dep, dkt. #34-15, at 68, but that is inadmissible both because Warren does not identify what the harassment was and because it is hearsay.

None of the admissible evidence relates to conduct that was directed at Stanford. The Court of Appeals for the Seventh Circuit has stated that the conduct directed at a third party may contribute to a hostile work environment, e.g., Smith v. Sheahan, 189 F.3d 529, 534 (7th Cir. 1999), but plaintiff cites no cases in which the court found that such conduct was sufficient by itself to sustain a claim. In fact, the court of appeals has held repeatedly that conduct similar to that witnessed by Stanford does not rise to the level of a hostile work environment. E.g., Yancick v. Hanna Steel Corp., 653 F.3d 532, 545, (7th Cir. 2011) (no hostile work environment when plaintiff witnessed coworkers being "bullied"); Gleason v. Mesirow Financial, Inc., 118 F.3d 1134, 1144-45 (7th Cir. 1997)(no hostile work environment when coworker "referred to female customers as 'bitchy' or 'dumb,' on occasion appeared to be ogling other female employees, flirted with [plaintiff's] female relatives, and allegedly commented on the anatomy of one of [plaintiff's] co-workers"); Rennie v. Dalton,

3 F.3d 1100, 1107 (7th Cir. 1993) ("one off-color joke and a conversation about a strip bar" not sufficient). See also Yuknis v. First Student, Inc., 481 F.3d 552, 554 (7th Cir. 2007) ("The more remote or indirect the act claimed to create a hostile working environment, the more attenuated the inference that the worker's working environment was actually made unbearable.").

Particularly because plaintiff identifies only two comments that Stanford overheard, I cannot conclude that plaintiff's evidence as to Stanford is sufficient to proceed to trial. Thompson v. Memorial Hospital of Carbondale, 625 F.3d 394, 401 (7th Cir. 2010) (isolated comments not sufficient); Ford v. Minteq Shapes and Services, Inc., 587 F.3d 845, 847-48 (7th Cir. 2009) (same). See also Baskerville v. Culligan International Co., 50 F.3d 428, 430–31 (7th Cir.1995) (following evidence not sufficient: (1) calling plaintiff "pretty girl"; (2) making grunting sounds when plaintiff wore leather skirt; (3) saying to plaintiff that his office was not hot "until you walked in here"; (4) stating that public address announcement asking for everyone's attention meant that "all pretty girls [should] run around naked"; and (5) alluding to his wife's absence from town and his loneliness, stating that he had only his pillow for company while making obscene gesture). Plaintiff cites Reeves v. C.H. Robinson Worldwide, Inc., 594 F.3d 798 (7th Cir. 2010), as an example of a case in which the court found in favor of a plaintiff on a harassment claim even though the comments at issue were not necessarily directed at her. However, in Reeves, various male coworkers called other

women names such as "bitch," "fucking bitch," "fucking whore," "crack whore," and "cunt" on a daily basis. Id. at 812. That cannot be compared to the two statements overheard by Stanford.

2. Tylah Baetje

Plaintiff relies on the following acts of alleged harassment to support its claim related to Baetje:

- on two occasions a co-worker named Jorge made a comment about the size of Baetje's chest and told her she had a "nice butt." Baetje Dep., dkt. #17-18, at 50;
- Jorge made comments "about [Baetje's] tongue ring and performing oral favors and something about whipped cream," id. at 56; in particular, he asked how "blow jobs" felt with her tongue piercing and "possibly ask[ed] [her] for a 'blow job.'" Baetje Decl. ¶ 3, dkt. #33;
- a co-worker named Cesar told her she "looked good" and had a "nice butt." Baetje Dep, dkt. #17-18, at 62;
- "every once in a while," Cesar would make "a kissing or licking motion." Id. at 69;
- on one occasion, Baetje's "butt was touched" by Cesar. Id. at 64;
- on one occasion, Cesear "put his hands down [Baetje's] pants." Id. at 65; and
- Jorge and Cesar "would snap towels at [Baetje's] butt, hitting [her] with them." Baetje's Decl. ¶ 5, dkt. #33.

Defendant notes that some of the alleged harassment did not occur at the restaurant,

but it does not argue that the incidents should be excluded from consideration, so I have included that evidence in the mix. Lapka v. Chertoff, 517 F.3d 974, 983 (7th Cir. 2008) ("[H]arassment does not have to take place within the physical confines of the workplace to be actionable.").

Plaintiff cites evidence that Baetje was subjected to a variety of verbal and physical harassment on multiple occasions. That is sufficient to survive defendant's motion for summary judgment as to this employee. EEOC v. Management Hospitality of Racine, Inc., 666 F.3d 422, 433 (7th Cir. 2012) (statements that female employee was "kinky" and liked it "rough," proposition for sex and "slap groping" her buttocks were sufficient); Berry, 618 F.3d at 692 ("[A] single act can create a hostile environment if it is severe enough, and instances of uninvited physical contact with intimate parts of the body are among the most severe types of sexual harassment."); Boumehdi v. Plastag Holdings, LLC, 489 F.3d 781, 789 (7th Cir. 2007) (approximately 18 sexual comments over course of year enough to provide basis for hostile work environment claim under Title VII); Bannon v. University of Chicago, 503 F.3d 623 (7th Cir. 2007) (repeated use of racist slurs is sufficient); Patton v. Keystone RV Co., 455 F.3d 812, 816-17 (7th Cir. 2006) (allegation that harasser's "hand was under [plaintiff's] shorts, on her inner thigh, and touching her underwear" was sufficiently severe).

3. Margaret Warren

Plaintiff relies on the following acts of alleged harassment to support its claim related to Warren:

- Warren was "cornered in the freezer" by two male employees who were speaking Spanish and they said something about her "grande chi chis" (which is slang for breasts); the employees "look[ed] [Warren] up and down with their eyes" and laughed; Warren pushed her way through them. Warren Dep., dkt. #17-19, at 21;

- a male employee made "kissing noises" at Warren and followed her as she was walking toward the restroom. Id. at 35, 39;

- Warren heard a male employee making comments such as, "Oh, she's hot. I wouldn't mind tapping that." Id. at 84.

Although Warren's allegations present a close question, I conclude that they are sufficient to survive summary judgment. The alleged incident in the freezer was the most serious. Warren was in a confined space, alone and without any means of escape when the two male employees confronted her, blocked her path, used sexual language toward her, looked her up and down and laughed. Although the male employees did not actually touch Warren, a reasonably jury could find that the male employees' conduct was physically threatening and intended to intimidate, which is an important factor. Harris, 510 U.S. at 23. Even if the male employees did not lay their hands on Warren, such an aggressive sexual advance likely would create a hostile work environment for Warren in the future because she would never know whether the incident would be repeated or escalated. In fact, Warren

testified that she felt "very uncomfortable" after the incident and asked for a transfer. Warren Dep., dkt. #17-19, at 11, 29.

The other two incidents were not as serious, but they provide some additional support to show that Warren was subject to a hostile work environment. Accordingly, I am denying defendant's motion for summary judgment with respect to Warren's claim.

4. Cassandra Giese

Plaintiff relies on the following acts of alleged harassment to support its claim related to Giese:

- Giese was "cornered" in the break room by a coworker, who said something in Spanish and tried to touch her hips (he did not touch her because another employee walked in); Giese believes the statement was sexual because he had "a little sneer on his face;" the incident lasted approximately 30 seconds. Giese Dep., dkt. #17-16, at 15, 67;

- Giese observed an incident in which "[i]t looked almost like [another female employee] was trying to fight this guy off," but he left after Giese walked in. Id. at 45.

Plaintiff cites Giese's testimony that she heard sexual jokes and comments "all the time," id. at 51, but I cannot consider that testimony because Giese did not identify what any of those comments were.

Giese's testimony regarding being cornered in the break room is similar to Warren's testimony regarding the incident in the freezer. Again, although it is a close question, I

conclude that a reasonable jury could find that the incident was sufficiently severe to create a hostile work environment for Giese.

4. Lacey Stanclift

Plaintiff relies on the following acts of alleged harassment to support its claim related to Stanclift:

- when Stanclift was 14 years old, a 30-year-old male employee asked for her phone number. Stanclift Dep., dkt. #17-17, at 25.

Generally, asking for another's phone number on one occasion would not be considered harassment, let alone severe or pervasive. In this case, the vast age difference between Stanclift and the other employee certainly would allow a jury to infer that the other employee acted inappropriately. However, because he did not touch Stanclift, threaten her or make any sexual advances or comments to her and he never asked for her phone number again, this one incident is not sufficiently severe to sustain a claim under Title VII.

ORDER

IT IS ORDERED that

1. Plaintiff Equal Employment Opportunity Commission's motion for leave to file supplemental authority, dkt. #63, is GRANTED.

2. Defendant Missoula Mac, Inc.'s motion for partial summary judgment, dkt. #16, is GRANTED with respect to the claims related to Liberty Stanford, Lacey Stanclift, Darla Ebbs, Vanessa Bennett and Stephanie Reilly. The motion is DENIED with respect to the claim related to Tylah Baetje, Cassandra Giese and Margaret Warren.

3. To avoid any confusion regarding the scope of the issues for trial, plaintiff and intervenor plaintiffs must submit to the court by June 6, 2012, a list of all the claims they intend to assert at trial. If defendant objects to the inclusion of any of those claims, it should explain its objection in writing by June 20, 2012. If further briefing is needed, the court will request it at that time.

Entered this _____ day of May, 2012.

BY THE COURT:

_____
BARBARA B. CRABB
District Judge